U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

August 12, 2005

BY HAND

Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Associated Press v. United States Dep't of Defense, 05 Civ. 3941 (JSR)

Dear Judge Rakoff:

In accordance with the Court's directive at oral argument on July 29, 2005, the Department of Defense (DOD) respectfully submits this letter-brief and the accompanying Second Supplemental Declaration of Karen L. Hecker, to set forth its position on whether detainees should be asked whether they consent to disclosure of their identifying information sought by plaintiff the Associated Press ("AP") in this Freedom of Information Act ("FOIA") action. For the reasons set forth below and in the accompanying Hecker Declaration, DOD opposes the imposition of any requirement that it ask detainees whether they consent the requested disclosure. DOD respectfully requests that these submissions be docketed and filed with the Clerk of Court so that they may be made part of the proceedings in this case. A disk containing pdf copies of each document is enclosed for that purpose.

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FOIA Does Not Require DOD to Ask the Detainees Whether They Consent to Disclosure

The case law interpreting FOIA exemption 6 ("Exemption 6") requires courts, in determining whether disclosure is appropriate, to answer a legal question: whether an individual's privacy interest in keeping personal information about himself non-public outweighs the public interest in disclosure of that information. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976). In assessing the nature and extent of the privacy interests at stake, the government is not required to ask the subject of the information whether or not he consents to the requested disclosure. See Halpern v. FBI, No. 94-CV-365A, 2002 WL 31012157, at *10 (W.D.N.Y. Aug. 31, 2002) (there exists "no authority requiring the Government to contact [individuals mentioned in documents] for Exemption 6 to apply"); Blakey v. Department of Justice, 549 F. Supp. 362, 365 (D.D.C. 1982) (FOIA does not require agency to obtain permission from subject of FOIA request to comply with request) (Exemption 7(C)), aff'd, 720 F.2d 215 (D.C. Cir. 1983).[1] Indeed, given the volume of FOIA requests and number of individuals who would have to be contacted, the burden on agencies under such a regime would be unimaginable. Rather, the legal framework of Exemption 6 charges the government with asserting any privacy interests protected by law, while allowing the subject of the requested information to weigh in on the question of disclosure by intervening in the suit between the requester and the government. See, e.g., Public Citizen Health Research Group v. United States Dep't of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978); Judicial Watch, Inc. v. FDA, No. Civ. A. 00-2973 (RJL), 2005 WL 1005996, *1 n.1, *4 (D.D.C. Apr. 27, 2005). Here, furthermore, as noted at oral argument, the Guantanamo detainees are not without the means to publicly identify

[1] But see War Babes v. Wilson, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (requiring National Archives to contact former World War II servicemen to ask whether they objected to disclosure of their addresses to individuals who believed servicemen to be their fathers and wished to contact them). The unique facts of War Babes – which involved a FOIA request intended to facilitate the reuniting of an aging veteran with his long lost offspring – distinguish it from the situation here. Moreover, the court expressly found that contacting the 34 servicemen identified in the FOIA request, unlike seeking out the informed consent of the hundreds of detainees here, would require a "trivial expenditure of money and effort" by the agency. Id. at 4.

themselves with their personal histories if they wish to, such as by filing a habeas petition or asking their families to publicize their cases in the media or on detainee support websites such as cageprisoners.com.

It is unclear, furthermore, in what cases it would be appropriate to require an agency to canvass detainees or other individuals, for FOIA does not address the issue. While the Court at oral argument expressed the view that the fact that the detainees are in DOD's custody suggests the possibility of DOD seeking out their positions on disclosure, as demonstrated in the Hecker Declaration, the detainees' custody does not diminish the burden on the agency of complying with any such requirement. To the contrary, the Declaration shows the unique difficulties of implementing an informed consent procedure for a detainee population consisting of foreign fighters who do not speak English, may be illiterate, and distrust DOD. Thus, even where the subjects of requested information may appear accessible at first blush, canvassing them for their consent may in fact present unique – and in this case operationally intolerable – difficulties. See Sec. Supp. Hecker Decl. ¶¶ 2-13. Other agencies would undoubtedly confront similarly unique difficulties in any given case. Thus, requiring the government here to seek out the detainees' positions on disclosure would set a precedent fraught with burdens not contemplated by FOIA.

Requiring DOD to Ask Detainees Whether They Consent to Disclosure Could Open the Door to Further Litigation and the Creation of Rights and Obligations at Odds with FOIA

Finally, imposing a requirement that DOD ask the detainees whether they consent to disclosure could set the stage for a host of challenges concerning whatever informed consent procedure DOD would develop and implement. FOIA provides no guidance for resolving such disagreements. Moreover, their resolution has the potential to create new rights, and impose new obligations, not remotely contemplated by FOIA.

Whatever informed consent procedure DOD might ultimately adopt could give rise to an array of difficult and unresolved procedural questions. For example, could AP challenge the adequacy of DOD's informed consent notice? Or DOD's representation that a particular detainee refused to consent? How would that question be litigated? Would DOD have to go back to the detainee and obtain an additional statement attesting to his non-consent, a statement the detainee could well refuse to provide for any number of reasons having nothing to do with the litigation? Or conversely, could a detainee challenge DOD's representation that he did consent? In what forum? If a detainee rescinds his consent but DOD has already made disclosure to AP based on that consent, would the detainee have a cause of action against DOD? The resolution of these questions and others that would inevitably arise has the potential to create rights and impose obligations on DOD that FOIA nowhere contemplates. Nor does FOIA contemplate that agencies would have to devote time and resources to even litigating such questions.

For the foregoing reasons and those set forth in the Second Supplemental Hecker Declaration, DOD respectfully submits that it should not be required to ask detainees whether or not they consent to disclosure of the identifying information sought by AP.

Thank you for your consideration of this matter.

Respectfully,

DAVID N. KELLEY
United States Attorney

By: Elizabeth Wolstein
ELIZABETH WOLSTEIN
Assistant United States Attorney
Tel. No.: (212) 637-2743
Fax No.: (212) 637-2686

cc: David Schulz, Esq. (by fax and Federal Express, w/ Hecker Declaration)